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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
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ORIGINAL

ILLINOIS-AMERICAN WATER COMPANY,)
and THAMES WATER AQUA HOLDINGS,)
GmbH)
Joint Application for Approval of Proposed)
Reorganization and Change in Control of)
Illinois-American Water Company Pursuant to)
Section 7-204 of The Illinois Public Utilities Act.)

Docket No.01-0832

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INTERVENER CITY OF PEKIN'S RESPONSE
TO JOINT APPLICANT'S MOTION FOR LEAVE TO FILE
ADDITIONAL EVIDENCE AND REQUEST FOR ADDITIONAL HEARING

Now comes The CITY OF PEKIN, a municipal corporation, by Patrick E. Oberle, Corporation Counsel, Burt L. Dancey, Assistant Corporation Counsel, and William P. Streeter, Assistant Corporation Counsel, and Edward D. McNamara, Jr., of McNamara & Evans, and as answer to the Motion filed in the above entitled docket on behalf of the joint applicants responds as follows:

1. The joint applicants' attempt to reconstruct their verified application, and implicit therein, their agreement and plan of merger, by slight of language and the ignoring of context, is incredible. The verified application of the applicants contains thirty-eight paragraphs of factual allegations or legal conclusions. Nowhere in those thirty-eight paragraphs is there any mention, allegation, or mere suggestion of the "any other entity owned or controlled directly or indirectly by Thames Holdings and managed by Thames," the language quoted by the joint applicants in their Paragraph 1, as if it were an integral part of their application. The language they quote is found in the verified application on page twelve, in the prayer for relief clause only, and in

a footnote to Exhibit G, as an attachment and supplement to Paragraph 38. Even there, it seems to indicate an existing entity at the time the application was filed.

2. The direct testimony referred to by joint applicants in their Paragraph 2 of the Motion for Leave did anything but “clearly” indicate ownership by an intermediary company owned by Thames Holdings. Again, the joint applicants are attempting to distort the record. If that was “clearly” indicated, then both the intervener and staff would have taken necessary steps to obtain more information about that intermediary entity, as it forms an essential component part of the plan of reorganization.

In fact, Mr. Carmedy’s direct testimony, found in Exhibit 2.0 (page 5, lines 94 - 98), states, “A diagram of the transaction is included in the Appendix to testimony as Exhibit G. As a result of the transaction, instead of American’s stock being held by many individual stockholders, Thames Holdings will acquire American’s common stock, and American will become a wholly-owned subsidiary of Thames Holdings, which, in turn, is a wholly owned subsidiary of RWE.”

That direct testimony of Mr. Carmedy is clear and unambiguous. It, as such, stands in full consistency and support of the verified application filed by joint applicants. However, that testimony is directly contradictory to the allegations of Paragraph 2 in the joint applicants’ Motion for Leave to File Additional Evidence, which suggests that Mr. Carmedy’s testimony clearly indicates the contrary.

3. In Paragraph 3 of their joint motion, joint applicants appear to castigate the staff and interveners for not making data requests during the discovery phase of this proceeding. Given the record, and this new context — the lack of forthrightness

and detail regarding the phantom corporation in the application and in the direct testimony — and given their own acknowledgment at this time that further information needs to be provided, joint applicants' brazenness in finding fault with staff and the interveners' is incredible.

4. As set forth above, Michael Carmedy's testimony on direct examination indicated clearly and unambiguously that the companies set forth in the verified application, being American, Thames Holding, and RWE, were the companies that would be in the reorganized structure. His direct testimony as to the transaction made no mention of the phantom corporation. Only in cross examination of Mr. Carmedy did he reveal that there could possibly be "another corporation in the group between Thames Aqua Holdings and American." See Trp. 159. He admits, however, that the decision about another corporation won't be made until "as close to the time of the transaction completing as possible." Trp. 159. His testimony in response to further cross examination shows an adeptness at evasion and double speak.

"Q. And are we concerned whether we bring it into existence or not with German law, British law, or American law?

A. It could be a combination of many things that need to be taken into account by lawyers and accountants closer to the day once we know it — — the approval process is a lengthy process and we need to see where we stand closer to completion of the transaction.

Q. Well, what would be those factors that would likely create another wholly owned subsidiary between Thames and American?

A. It is hard to estimate. I don't know what is going to happen in the future.

Q. But what factors, what circumstances in the future would impact that decision?

A. I don't know. I can't predict the future.

Q. So at some point in time as close as can be to the closing of the transaction, the lawyers and accountants will get together and make a decision as to whether we need another company in between Thames and American?

A. Which would be a wholly-owned subsidiary of Thames Aqua Holdings, GmbH.

Q. Okay, and we have created whole group of board members?

A. No, and if there was another board, that would not be a concern for the customers of Illinois-American because as we have said they will see no increase in costs as a result of this transaction.

Q. Well, what would the purpose be, if you know, of the creation of another subsidiary in the loop?

A. It would be dependant on structuring. I always take the advice of the lawyers and accountants closer to time.” Trp. 167 - 169.

That was the first time any detail with respect to the phantom corporation was disclosed, and any indication of the reasons, purposes, and timing for the creation of such phantom corporation.

5. In addition to Commission staff requesting information, the interveners, in their motion to consolidate, attempted to outline the gross deficiencies in the verified application and in the testimony with respect to this new corporation. See, Reply of the City of Pekin to the Responses to Motion for Consolidation, paragraph 4.
6. Joint applicants are, in essence, through this supplemental request for leave to present new evidence, in fact attempting to revise and amend their verified application as well as the direct testimony of Mr. Carmedy. The interveners and staff were led to believe that the original application, — RWE holding Thames, Thames holding American, American holding Illinois American — was complete and accurate. Joint applicants' most recent filing now admits the incompleteness and inaccuracy of the verified application.

7. Joint applicants now state a desire to present additional evidence “for the limited purpose of describing in further detail the potential addition of intermediary holding companies to the RWE / American post merger corporate structure.” (Emphasis added). 220 ILCS 5/7-204, which requires Commission approval of this reorganization, defines “reorganization” as a “change in the ownership of a majority of the voting capital stock of an Illinois public utility.” Allegations regarding the new owner of a majority voting stock of Illinois American are fundamental to this Commission’s evaluation of this application. It is now apparent, at least since Mr. Carmedy’s disclosures at the live hearing, that there is in fact a plan to have as an essential component company of the reorganization, another “potential intermediary holding company or companies” that will own or control a majority of the stock of American Water, and thereby Illinois-American. As such, it was incumbent upon the joint applicants to have clearly set forth the complete and accurate reorganization structure in the verified application filed by them to begin this docket. They did not do so.

Additionally, Section 200.100 of the Administrative Code requires pleadings to contain “a plain and concise statement of any facts upon which the pleadings are based.” Because the application alleges absolutely no facts regarding this most fundamental issue, the application is fatally deficient.

8. Joint applicants should be made to follow the statutory requirements, as well as the Commission’s rules, and they should be made to file a proper, full, and complete amended verified application, for the first time setting forth the reorganization for which they are seeking approval. They are attempting to cure a fatal defect and

deficiency in their verified application, fatal under the statutory provisions and under the Commission procedures, by tacking on, after the fact, additional evidence. To permit joint applicants to conveniently omit, or cleverly bury, an essential component part of a reorganization, and only divulge it after the fact, by way of perfunctory evidence, is to turn on its head the letter and the spirit of the statutory scheme and the regulatory process for Commission approval.

9. The verified application of these joint applicants bears further scrutiny in this respect. On page 2 of the verified application, under the heading "THE COMPANIES INVOLVED" the applicants under oath set forth the companies involved in the transaction. Mentioned in Paragraphs 1 through 5 are Illinois-American, American Waterworks Service Company, Thames Holdings, RWE, and Thames Water, PLC. That's it. From the outset, the joint applicants have represented, and represented under oath and repeatedly, that those are the only companies involved.

Continuing on in the verified application, the joint applicants, in Paragraphs 6 through 15, set forth the agreement between those companies. They again affirmatively represent that the agreement is between the companies previously set forth, and there is no allegation with respect to any phantom intermediary holding company between Thames and American.

10. Having filed an incomplete and inaccurate application with respect to the companies involved in the reorganization, the joint applicants should not be allowed to pass over that deficiency at the end of the process, through the additions of some additional testimony. Complete and full disclosure of the essential component parts of the reorganization is properly a threshold requirement. If full and complete disclosure

of the broad parameters of the reorganization transaction is not made at the outset, it taints the entire process and should not be allowed to be cured by expedited evidentiary submissions at the end.

11. The City of Pekin certainly wishes to have all the information it can, and wants the Commission and its staff to have all the information it can, about all matters and all the companies involved in this reorganization. It attempted to get that information during the cross-examination of Mr. Carmedy, who offered none of the detail, substance, or specifics with respect to the reorganization. However, the City of Pekin opposes and objects to joint applicants' request for leave to file additional evidence at this time, because it believes that joint applicants must first be required to file a new verified application, setting that information forth in the application.
12. Presentation of evidence regarding the potential addition of intermediary holding companies is, as joint applicants allege, "appropriate" in view of the concerns expressed by staff and certain interveners, and to assure that the record in this proceeding is fully developed. However, such presentation of evidence should not be done until the fundamental pleadings in this matter are full, accurate and complete.

WHEREFORE, intervener CITY OF PEKIN respectfully requests that the Commission deny joint applicants' motion for leave to file additional evidence and for additional hearing, and request that the Commission order joint applicants to submit a verified application, in proper form, setting

forth the full complete and accurate reorganization plan, and for a schedule for the balance of the proceedings with respect to that verified application, to be set by the Administrative Law Judge.

CITY OF PEKIN, Petitioner

By 

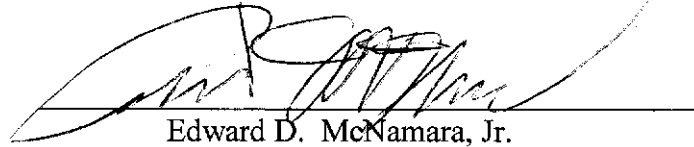
One of Their Attorneys

Attorney Patrick E. Oberle
Attorney Burt L. Dancey
Attorney William P. Streeter
ELLIFF, KEYSER, OBERLE & DANCEY, P.C.
P.O. Box 873
Pekin, Illinois 61554

Attorney Edward D. McNamara, Jr.
McNamara & Evans
931 South Fourth Street
P.O. Box 5039
Springfield, IL 62705

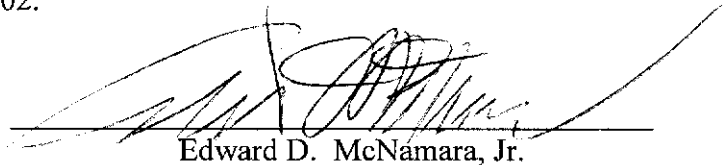
VERIFICATION

I, Edward D. McNamara, Jr., certify that: (i) I am one of the attorneys for the City of Pekin; (ii) I have read the foregoing RESPONSE TO JOINT APPLICANT'S MOTION FOR LEAVE TO FILE ADDITIONAL EVIDENCE AND REQUEST FOR ADDITIONAL HEARING; (iii) I am familiar with the facts stated therein; and (iv) the facts are true and correct to the best of my knowledge.


Edward D. McNamara, Jr.

CERTIFICATE OF SERVICE

Edward D. McNamara, Jr., an attorney, hereby certifies that he served copies of the RESPONSE TO JOINT APPLICANT'S MOTION FOR LEAVE TO FILE ADDITIONAL EVIDENCE AND REQUEST FOR ADDITIONAL HEARING on the individuals shown on the attached Service List, via electronic mail and First Class U.S. Mail delivery, postage prepaid and properly addressed, on Monday, June 10, 2002.


Edward D. McNamara, Jr.

SERVICE LIST

John A. Daly
Village of Orland Hills
16033 S. 94th Ave.
Orland Hills, IL 60477
john.a.daly@att.net

Bill Johnson
Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
bjohnson@icc.state.il.us

Stephen J. Mattson
Atty. for Thames Holdings and RWE
Mayer, Brown, Rowe & Mawe
190 S. LaSalle St.
Chicago, IL 60603-3441
smattson@mayerbrownrowe.com

Patrick E. Oberle,
Burt L. Dancey
William P. Streeter
Attys. for City of Pekin
Elliff, Keyser, Oberle & Dancey, P.C.
P.O. Box 873
109 S. 4th Street
Pekin, IL 61555-0873

Sue A. Schultz
General Counsel
Illinois-American Water Company
300 N. Water Works Dr.
P.O. Box 24040
Belleville, IL 62223
sschultz@illinoisamerican.com

Boyd J. Springer
Atty. for Illinois-American Water Company
Jones, Day, Reavis & Pogue
77 W. Wacker Dr., Ste. 3500
Chicago, IL 60601-1692
bjspringer@jonesday.com

Janis Von Qualen
Office of General Counsel
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
jvonqual@icc.state.il.us

Richard Hierstein
City of Pekin
400 Margaret St.
Pekin, IL 61554
dhierstein@ci.pekin.il.us

Steven Matrisch
Office of General Counsel
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
smatrisc@icc.state.il.us

Angela O'Brien
Atty. for Thames Holdings and RWE
Mayer, Brown, Rowe & Mawe
190 S. LaSalle St.
Chicago, IL 60603-3441
aobrien@mayerbrownrowe.com

Randall Ray
City of Peoria
419 Fulton, Room 207
Peoria, IL 61602-1270
rray@ci.peoria.il.us

Amy E. Smith
Atty. for Village of Orland Hills
Odelson & Sterk, Ltd.
3318 W. 95th St.
Evergreen Park, IL 60805

Mark H. Sterk
Atty. for Village of Orland Hills
Odelson & Sterk
3318 W. 95th St.
Evergreen Park, IL 60805
msterk@odelsonsterk.com